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OIL, GAS & MINING

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, et al, Petitioners, vs. UTAH DIVISION OF OIL, GAS & MINING, Respondent, ALTON COAL DEVELOPMENT, LLC and KANE COUNTY, UTAH, Respondent/Intervenors.	**ALTON COAL DEVELOPMENT, LLC'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO THE BOARD'S SUPPLEMENTAL ORDER** Docket No. 2009-019 Cause No. C/025/005

ARGUMENT

The Board of Oil, Gas and Mining ("BOGM") in its November 3, 2014, Supplement Order, and in follow-up discussions related to that Order, requested briefing on two issues:

1. BOGM has determined that its fee shifting Rule B-15 has both an objective and a subjective bad faith element. The issue at hand is, how is objective bad faith measured?

2. If BOGM finds that any of the 17 claims brought by Petitioners (Sierra Club, et al.) subjectively were brought in good faith, is Alton Coal Development, LLC ("ACD") entitled to recover under Rule B-15 for each of Petitioners' remaining claims brought in bad faith?

I. Utah's "Without Merit" Objective Bad Faith Standard

ACD, Petitioners, and the Division of Oil, Gas and Mining ("DOGM"), agree on the answer to BOGM's first question: BOGM should measure objective bad faith by using the "without merit" standard enunciated by the Utah Supreme Court.[1]

Additionally, the parties agree that the Utah Supreme Court has articulated at least three definitions for "without merit": (i) "bordering on frivolity," (ii) "of little weight or importance having no basis in law or fact," and/or (iii) "clearly [without] legal basis." See Cady v. Johnson,

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[1] "Without merit" comes from the Utah civil procedure rule for fee shifting due to bad faith. See Utah Code Ann. § 78B-5-825. The parties agree that Utah fee shifting rule is directly analogous to Rule B-15. As DOGM stated:

> [N]either Rule 11 nor contract law help with B-15's construction. The most analogous, and therefore most persuasive, fee shifting provision under Utah law is found in statute as part of the Utah Judicial Code [referencing the "without merit" language of Utah Code Ann. § 78B-5-825]. ....
> [T]he Utah Supreme Court has already defined "bad faith" in the attorney fee context ..., and it is reasonable for [BOGM] to follow suit. ... [DOGM] urges [BOGM] to interpret Rule B-15(d) like the analogous provision for fee shifting under the Judicial Code.
> DOGM Memo, pp. 6-7, 11.

Similarly, Petitioners stated:

> This statute is analogous to Rule B-15 .... Petitioners agree that litigation conduct that would not violate section 78B-5-825's "without merit" standard does not evince objective bad faith under Rule B-15.
> Petitioners' Memo, p. 7.

671 P.2d 149, 151 (UT 1983). Thus, for BOGM to find that Petitioners' claims were objectively "without merit," BOGM must find that they were frivolous, of little weight or importance, and/or without legal basis.[2]

But BOGM has already reviewed and decided the merits of all 17 of Petitioners' claims. Thus, it has already decided that all 17 of Petitioners' claims are without legal basis (at least). Moreover, the Utah Supreme Court has already reviewed and soundly rejected Petitioners' "best" three claims. For instance, the Utah Supreme Court found that the Utah Coal Mining Act "cannot reasonably be interpreted" as argued by Petitioners. Sierra Club v. BOGM, 2012 UT 73, ¶22. Consequently, BOGM does not need to repeat this analysis a second time. Since BOGM's objective bad faith determine is complete, the parties should now focus on the subjective bad faith element.

This pragmatic approach is entirely consistent with the decisions of the Utah Supreme Court. See Still Standing Stable, LLC v. Allen, 2005 UT 46, ¶¶7-16. While the Utah Supreme Court always addresses the legal standard for an objective "without merit" determination, it does so in a cursory fashion for matters that have already been decided and lost on the merits.[3] That is, where a claim has already been decided to be "without merit," there is no need to decide that issue twice. See id. at ¶8. The Utah Supreme Court does, however, devote substantial attention to the subjective bad faith element associated with fee shifting. This pragmatic approach makes

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[2] Both Petitioners and DOGM recognize the applicability of Utah's "without merit" standard, so it is curious that they nevertheless discuss Utah Rules of Civil Procedure Rule 11, particularly since both Petitioners and DOGM understand that Rule 11 is inapposite. Under Rule 11, monetary sanctions are imposed by courts for violation of the Rule. As noted above, DOGM states that Rule 11 provides no help with construction of Rule B-15 (DOGM Memo, p. 6), but they then argue its applicability anyway (DOGM Memo, p. 10). Similarly, Petitioners acknowledge that under Rule 11, "subjective intentions are essentially irrelevant" (which is why Rule 11 provides no help with B-15's construction) (see Petitioners' Memo, p. 9), and yet they devote four pages to arguing for a Rule 11 interpretation (cf. Petitioners' Memo, pp. 8-11). Because Rule 11 has an entirely different purpose and procedural basis than Rule B-15, and because it does not involve subjective intent, ACD will not devote any additional discussion to the inapposite Rule 11.

[3] "On the merits" means that a court or administrative body has heard and resolved definitively the asserted claims, whether through summary judgment, trial, or administrative hearing.

sense: the Court devotes its energy to that aspect of fee shifting that is directly related to bad faith (whether the litigant intended to act improperly). Thus, the Court warns that "the mere fact that an action is meritless does not necessarily mean that the action is also brought in bad faith. ... '[A] finding of bad faith turns on a factual determination of a party's subjective intent.'" Id. at ¶9 (citations omitted).

The Utah Supreme Court has routinely adopted the approach for matters that have been decided on the merits. For instance, the Utah Supreme Court followed this pragmatic approach in Wardley Better Homes and Gardens v. Cannon, 2002 UT 99, ¶30, 61 P.2d 1009, 1018 (2002). In that case, the Court cited the litany of legal definitions for "without merit" (i.e., "frivolous," etc.), but the Court did not devote any meaningful analysis to the issue. Rather, they found the claim to be "without merit" and devoted the bulk of their analysis to the question of subjective bad faith. See id. at ¶29.

Similarly, in Cady (the Utah Supreme Court case that enunciated the various legal definitions for "without merit"), the Court summarily found the claim to be "without merit" in one analytical sentence. See Cady, 671 P.2d at 151. The Court then devoted five paragraphs to a legal and factual analysis of the subjective bad faith element. Id. at 151-52.

Additionally, in Pennington v. Allstate Ins. Co., 973 P.2d 932, 939, fn. 3 (UT 1988), the Court summarily addressed the "without merit" standard simply by noting that the party claiming fee shifting was "the prevailing party."

As a final example, the Court employed this pragmatic approach when it once again determined a claim was "without merit" in one sentence. See In re Sonnenreich, 2004 UT 3, ¶47 (2004). The Court then devoted five long paragraphs to subjective bad faith. See id. at ¶¶48-52. The Utah Supreme Court uses this approach because it works for cases that have been resolved on the merits. In this regard the phrase "without merit" is a legal standard, and cases that have been resolved on the merits have already determined that the claims are legally "without merit." See id. at ¶45. Moreover, the Utah Supreme Court explained that the approach works because it

has a "safeguard against an overly broad application" because the prevailing party must still prove subjective bad faith. Id. at ¶46.

Petitioners and DOGM, however, urge BOGM to follow a different path. They argue that BOGM should revisit the merits of Petitioners' 17 claims, essentially requiring an all new, secondary merits hearing. In support of their argument, they chose not to focus on these Utah Supreme Court cases (they did not even cite Pennington or In re Sonnenreich). Rather, while they briefly noted Still Standing Stable, Wardley Better Homes, and Cady, they spent their time analyzing Utah Court of Appeals cases.[4]

Petitioners and DOGM cite Verdi Energy Group, Inc. v. Nelson, 2014 UT App. 101, ¶¶33-35 (2014), which decision was rendered by the Utah Court of Appeals not by the Utah Supreme Court. While Petitioners and DOGM are correct that the Verdi Energy decision analyzes whether the claims were "without merit," a good question is "Why would the Court of Appeals engage in that analysis?" The answer appears to be that the party seeking fees did "not make much of an attempt to support ... the without merit determination ...." Id. at ¶35. Additionally, the Court of Appeals was clearly influenced by the fact that the district court had originally granted a prejudgment writ of attachment to Verdi, which "indicated that Verdi's claims had some colorable basis in law and fact." Id. at ¶34, fn. 10. Under those facts, where both the claimant and the trial court seemed ambivalent about whether the claims were "without merit," perhaps the Court of Appeals felt compelled to closely examine the issue. Thus, Verdi Energy appears limited to its unique facts, and it is distinguishable from the pragmatic Utah Supreme Court decisions.[5]

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[4] DOGM did quote one additional Utah Supreme Court decision, Warner v. DMG Color, Inc., 2000 UT 102, ¶¶21-23 (2000). See DOGM Memo, p. 9. The Warner Court employed the same summary "without merit" approach as the other Utah Supreme Court decisions.

[5] DOGM also cites In re Sheville, 2003 UT App. 141, ¶6 (2003). Since In re Sheville does not squarely address a bad faith determination (primarily, it just affirms the trial court's bad faith determination) it is of little practical guidance. See id.

Petitioners also cite Martin v. Rasmussen, 334 P.3d 507 (UT Ct. App. 2014), yet another Utah Court of Appeals decision. Martin fails to cite any of the leading Utah Supreme Court decisions on fee shifting based on bad faith. Cf. id. at ¶¶21-26. Not surprisingly, it does not follow their pragmatic approach, but instead uses the approach endorsed by Petitioners. Indeed, the Court of Appeals devoted six paragraphs to a torturous determination as to whether the Rasmussens' claims were "without merit." See id. Most importantly, it appears that the Court of Appeals took this approach because Martin did not involve an "action" resolved "on the merits," but rather involved the enforcement of a settlement agreement. See id. at ¶23, fn. 3. Thus, it may not have been appropriate to follow the Utah Supreme Court's pragmatic approach.

Interestingly, footnote 3 in Martin cites as its authority the Utah Court of Appeals decision Dahl v. Harrison, 2011 UT App. 389 (2011). Petitioners also cite Dahl extensively (erroneously claiming that it supports their position that a single meritorious claim would immunize them from fee shifting for their bad faith). Cf. Petitioners' Memo, pp. 2, 17-18. Petitioners, however, fail to note the most interesting aspect of Dahl (and the aspect for which it is cited by Martin). In Dahl, fees were sought for alleged bad faith associated with the filing of a motion in limine, such that there was not an "on the merits" decision underlying the bad faith award. See Dahl, 2011 UT App. 389, at ¶¶39-42.

This distinction (whether a claim has already been resolved on the merits) seems of paramount importance, and it provides an appropriate route for BOGM to adopt in all cases. When (as in ACD's case) fees are sought after a matter has been decided on the merits then the Utah Supreme Court's pragmatic approach should be used. Thus, BOGM should find that the claims are objectively "without merit" and move to a substantive inquiry into subjective bad faith. But, if fees are sought (in some other, future matter) on an ancillary issue, not decided on the merits, then BOGM should first decide whether the issue is "without merit" before considering subjective bad faith.

As applied to ACD's fee petition, since Petitioners have lost on the merits on all 17 of their claims, the objective standard has already been met. Consequently, BOGM only needs to

determine Petitioners' subjective intent. If BOGM determines that Petitioners intended to act improperly, then BOGM should award ACD's fees.

II. Attorneys' Fees Are Allocable

BOGM's second question is readily answered. ACD and DOGM agree that any meritorious claims by Petitioners (if there are any) will not immunize Petitioners from their liability for their bad faith claims. This position is well-established. See Fox v. Vice, 131 S.Ct. 2205, 2214 (2011) ("the presence of reasonable allegations in a suit does not immunize the plaintiff against paying for the fees that his frivolous claims imposed"). As DOGM eloquently explained:

> Any other interpretation of the separability question incentivizes poor legal behavior. For instance, under an absolute bar to separability a party would be able to mask nine frivolous claims behind one meritorious one. This could lead to an explosion of frivolous litigation that wastes [BOGM's] time and interferes with the regulatory process.
> DOGM Memo, p. 12.

The Interior Board of Land Appeals also allocates fees among separate issues when awarding fees under the federal analog to Rule B-15. See, e.g., Nat. Res. Def. Coun. v. Office of Surface Mining, 107 IBLA 339, 369 (Mar. 20, 1989) (awarding fees under 43 C.F.R. 4.1294(b)). Petitioners have not cited any cases to the contrary. Cf. Petitioners' Memo, pp. 16-19.

Instead, Petitioners make the astounding assertion that – because Rule B-15 uses the word "proceeding" – somehow any good faith allegations protect them from the application of Rule B-15. Their argument ignores the context of the word "proceeding." Rule B-15 applies to parties who "initiate" or "participate in" a "proceeding." Thus, all Rule B-15 requires for Petitioners to be held accountable is that they initiated or participate in a proceeding. They did both; they initiated and participated in a challenge to ACD's permit (a "proceeding"). Consequently, Petitioners' all-or-nothing argument does not make sense.

Additionally, Petitioners' all-or-nothing construction of "proceeding" is at odds with the Interior Board of Land Appeals precedent that separated compensable from non-compensable

issues in a fee award to a petitioner under subsection 4.1294(b) of the federal rules. That subsection, like the applicable part of Rule B-15, also uses "proceeding" in the singular. Nat. Res. Def. Coun., 107 IBLA at 369.

Nevertheless, Petitioners cite Dahl in alleged support for their position. In Dahl, the Utah Court of Appeals declined to apply Utah Code Ann. § 78B-5-825 because it expressly is limited to "actions" (which are decided "on the merits"), rather than simple motions. See Dahl, 2011 UT App. 389, at ¶39. But, if Dahl actually had supported Petitioners' "proceeding" argument, it would have had to find that fee shifting is only available when entire "actions" are in bad faith. It did not. Rather, just like the requirement in B-15 that fees are only available in the context of a "proceeding," it simply found that under Section 78B-5-825 fees are only available in the context of an "action." Thus, Dahl does not support (or even address) Petitioners' argument.

Finally, Petitioners focus on the word "the" as the key to their supposed absolution. Again, the context is important. Rule B-15 authorizes fee shifting when proceedings are initiated "in bad faith for the purpose of harassing or embarrassing the permittee." Petitioners assert that the word "the" in that phrase is determinative. Remarkably, they argue that Rule B-15 would need to say "in bad faith for a purpose of harassing or embarrassing the permittee" in order to hold them responsible for their bad faith. Otherwise, they argue, it is acceptable that they litigated "in bad faith for the purpose of harassing or embarrassing the permittee" so long as they had any other purpose (such as, for instance, using the ACD permit challenge as a way to raise funds for their general operations and payroll).

Rule B-15 is silent, however, regarding whether any purpose of Petitioners (aside from harassment or embarrassment) is relevant. Petitioners stretch Rule B-15 too far by suggesting that any alternative or additional legitimate purpose is controlling. Additionally, the construct argued for by Petitioners is grammatically and stylistically wrong: no one would ever write "in bad faith for a purpose of harassing or embarrassing the permittee." Finally, their interpretation would eviscerate Rule B-15: it would encourage parties to bring all sorts of outlandish permit

challenges before BOGM, secure in the belief that they could assert some other basis for their litigation in order to avoid responsibility for their bad faith.

In sum, under their strained analyses, Petitioners would have BOGM rule that only if a case is a complete vacuum, logically, factually, and legally, can a party then even inquire into possible improper or bad-faith motives. In Petitioners' view, any molecule of sense, fact, or law, floating in an otherwise empty shell of a case, can save the entire action from fee liability. As ACD has demonstrated, however, this endpoint is simply too far removed from the language of Rule B-15, and from BOGM's existing Order regarding the objective standard. In making their extreme argument, Petitioners rely on non-binding legal authorities from non-Utah jurisdictions, none of them interpreting the rule at issue. In doing so, Petitioners ignore the wise counsel of the Fox Court, frequently cited in this proceeding, which cautioned that care should be exercised in comparing fee-shifting statutes. Fox, 131 S.Ct. at 2215, fn. 3.[6] Worse, Petitioners ignore the clear mandate of the Utah Supreme Court, that cases under the Utah Coal Program are to be decided under Utah law. Sierra Club, 2012 UT 73, ¶¶ 41-42.

III. BOGM Should Order Discovery To Begin

Petitioners and DOGM argue for additional procedural steps before BOGM is able to resolve ACD's fee petition. BOGM should decline their invitation for additional, unnecessary work. BOGM has already resolved that Petitioners' 17 claims are "without merit." Therefore,

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[6] Not only does Fox warn against comparing fee shifting provisions in different statutes, it expressly contrasts the provision at issue in Fox with the provision at issue in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978). The fee shifting provision in Christiansburg Garment Co. was analogous to Rule 11, which is inapplicable to BOGM's Rule B-15. See Christiansburg Garment Co., 434 U.S. at 422. Indeed, that Court noted the distinction, stating "needless to say, if a plaintiff is found to have brought or continued such a claim in *bad faith*, there will be an even stronger basis for charging him with the attorney's fees …." Id. (emphasis in original). Consequently, when Petitioners discussed Christiansburg Garment Co. at length (cf. Petitioners' Memo, pp. 13-16), they knew (or should have known) that it was legally inapplicable. Also, if Petitioners reviewed subsequent precedent citing this case, they should have found Fox, which makes clear that fee shifting claims are allocable.

BOGM should allow ACD to move forward with its limited discovery in order to ascertain the extent of Petitioners' bad faith.[7]

CONCLUSION

Objective bad faith should be measured using Utah's "without merit" standard. Since BOGM has already determined that all of Petitioners' claims are without merit, BOGM should immediately order discovery to commence regarding Petitioners' subjective bad faith.

SUBMITTED this 23rd day of January, 2015.

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[7] It is ironic that Petitioners would decry "this protracted, satellite litigation" (Petitioners' Memo, p. 3), as they have repeatedly taken and recommended courses of action that simply serve to delay (and make more costly) resolution of the fee petition. For example, their foray to the Utah Supreme Court to pursue their entirely unprecedented and unwarranted Petition for Extraordinary Relief wasted all parties' time and resources. Now, they continue by recommending additional, unnecessary briefing (cf. Petitioners' Memo, pp. 19-20).

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2015, the foregoing **ALTON COAL DEVELOPMENT, LLC'S MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO THE BOARD'S SUPPLEMENTAL ORDER** was served electronically upon the following:

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